IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1940

No. .....

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, et al.,
Petitioners,

vs.

ROCKWELL LIME COMPANY, et al.,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Illinois is reported in 373 Ill. 309, 26 N. E. (2d) 99, and is found at pages 225 to 237 of the record. No opinion was filed by the Circuit Court of Cook County. The finding and judgment of that court is set forth at pages 202 to 204 of the record. The report and order of the Illinois Commerce Commission entered under date of January 4, 1933, dismissing the complaint herein is set forth at pages 2 to 17 of the record.

STATEMENT AS TO JURISDICTION AND STATEMENT OF THE CASE.

A statement of the grounds upon which jurisdiction of this Court is invoked is set forth in the petition (pp. 8-10), as is also a statement of the case (pp. 1-8, 10-13).

SPECIFICATION OF ERRORS.

The errors intended to be urged are those specified in the accompanying petition (ante, pp. 13-16) numbered 1 to 4, and including subsections (1) to (12), inclusive, the same being assigned as errors.

SUMMARY OF ARGUMENT.

1. The Supreme Court of Illinois erred in sustaining a collateral attack upon and thus interfering retrospectively with administrative determinations made by the Interstate Commerce Commission and the Illinois Commerce Commission as public agencies in a joint hearing under authority of the Congress.

2. The Supreme Court of Illinois erred in asserting power to review and annul determinations and orders of the Interstate Commerce Commission.

3. The decision of the Supreme Court of Illinois is violative of principles applied and emphasized by the Court in *U. S.* v. *Chicago Heights Trucking Co.*, ... U. S. ....., May 20, 1940, that the Interstate Commerce Commission and the Illinois Commission are expert bodies informed by experience and their acts are those of public agencies carrying out duties imposed by the Congress in the interest of shippers generally, the national transportation system and the public interest.

This case does not represent mere private litigation. It is one in which the public has a vital interest in order that, among other things, the rule of uniformity in charges be applied and creation of preferences and discriminations prevented.

4. The law does not permit the court to lay aside as without evidentiary force reports and orders of the Interstate Commerce Commission and of the Illinois Commerce Commission introduced of record.

5. Under similar circumstances the absence of state jurisdiction has been determined on the pleadings.

6. Respondents' cause is barred by the principle of administrative finality.

7. Respondents' petition for rehearing filed with the Illinois Commission raised no question as to the sufficiency of the evidence in respect of the Interstate Commerce Commission's report and order in the *Chicago Producers case.*

8. Upon this record, and on authority of *Atlantic Coast Line* v. *Florida,* 295 U. S. 301, there is no legal theory supporting the judgment requiring petitioners to reduce retroactively rates approved by the Interstate Commerce Commission and the Illinois Commission in concurrent orders.

ARGUMENT.

I.

THE SUPREME COURT OF ILLINOIS ERRED IN SUSTAINING A COLLATERAL ATTACK UPON AND THUS INTERFERING RETROSPECTIVELY WITH ADMINISTRATIVE DETERMINATIONS MADE BY THE INTERSTATE COMMERCE COMMISSION AND THE ILLINOIS COMMERCE COMMISSION AS PUBLIC AGENCIES IN A JOINT HEARING UNDER AUTHORITY OF THE CONGRESS.

The Supreme Court of Illinois erred fundamentally in refusing to give effect to the concurrent reports and orders entered by the Interstate Commerce Commission and the Illinois Commission under date of November 30, 1926.

The two Commissions not only were acting under specific authority of the Congress as set forth in section 13 (3) of the Interstate Commerce Act but also as public agencies carrying out duties imposed by the Congress in the interest of shippers generally, the national transportation system and the public interest. *U. S.* v. *Chicago Heights Trucking Co.*, ... U. S. ....., May 20, 1940. Cf. *Inland Steel Co.* v. *U. S.*, 306 U. S. 153, 157.

In the *Chicago Heights case, supra*, this Court reversed the judgment of the special United States District Court which had set aside an order of the Interstate Commerce Commission finding certain proportional rate schedules published by motor vehicle operators unduly preferential and unjustly discriminatory, and therefore violative of section 216 (d) of the Motor Carrier Act, 1935 (49 U. S. C. 316 (d)). There the Commission had instituted an investigation upon its own motion and based its findings and order upon evidence which had been introduced of record by those supporting the suspended schedules, since no one appeared at

the hearing in opposition to them. The three judge court, in concluding to set aside the Commission's order, drew inferences from the evidence opposite to those of the Commission and disagreed with the findings. As pointed out by this Court, "The exercise of judgment by the Commission and by the court in appraising the same evidence" led to "opposing conclusions." This Court in sustaining the order of the Interstate Commerce Commission held that the three judge court had no authority to weigh the evidence and reach conclusions differing from that of the Commission. That case, it should be emphasized, was a direct review according to law of the Interstate Commerce Commission's order. Here the Supreme Court of Illinois has attempted a review collaterally and without authority of law.

Preliminary to development further of this point, petitioners invite the attention of the Court to the following language in the decision of this Court in *Penn. R. Co.* v. *Ills. Brick Co.*, 297 U. S. 447, wherein a reparation order of the Illinois Commission was set aside by this Court on certiorari:

> "There is no suggestion that the intrastate rates in respect of which the Illinois commission awarded reparation were not made in obedience to and in strict accordance with the order of the Interstate Commerce Commission."

A similar situation is present in this record. There was no contention on the part of respondents before the Illinois Commission that the rates here involved were not in strict conformity with the report and order of the Interstate Commerce Commission in the *Chicago Producers case* as construed and applied in the *Chicago Gravel case.* This was indeed admitted in substance by respondents' principal witness, who asserted that the required relationship between

state and interstate rates could have been maintained by the petitioners by voluntarily reducing the interstate rates. (R. 46-47)

As was made clear in *Houston & Texas Ry* v. *United States*, 234 U. S. 342, better known as the *Shreveport case*, the Interstate Commerce Commission had power to fix relationship between state and interstate rates under the Interstate Commerce Act as it existed prior to its being amended and amplified in the Transportation Act of February 28, 1920.

Section 13 of the Interstate Commerce Act, as amended by the Transportation Act, accorded the Interstate Commerce Commission even wider power than it previously had, and this power has been sustained by this Court in a long line of cases, such as *Wisconsin R. R. Comm* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, *New York* v. *United States*, 257 U. S. 591, *Illinois Commerce Comm'n* v. *U. S.*, 292 U. S. 474.

To obtain the cooperation of state authorities in cases involving relationships of rates on state and interstate traffic, and to minimize as far as possible opportunities for conflict between state and interstate orders, the Interstate Commerce Act was amended by the Transportation Act by including section 13 (3), which provides:

> "Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission *may confer* with the authorities of any State having regulatory jurisdiction over the class of

persons and corporations subject to this part with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to *hold joint hearings* with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also *authorized to avail itself of the cooperation, services, records, and facilities of such State authorities* in the enforcement of any provisions of this part." (Emphasis supplied.)

It will be noted from the foregoing quotation that the statute expressly authorizes the Commission to hold conferences with authorities of any state, to hold joint hearings with state regulating bodies, and in general to avail itself of the cooperation, services, records, and facilities of the state authorities in the enforcement of the provisions of the act.

It will be noted also that the Congress likewise in section 13 (3) of the act authorized the Commission to prescribe rules in connection with the exercise of this power. These rules are embodied in an agreed statement of principles adopted by the Interstate Commerce Commission and the National Association of Railway and Utilities Commissioners, of which the Illinois Commission is a member, as set forth on pages 1832-1838 of Volume 3, Interstate Commerce Acts Annotated (Senate Document No. 166, 70th Congress). On page 1835 it is stated:

"Cooperation is but the working together for a common object or to a common end or result, which end or result is the best possible regulation of the railroads

and utilities mutually under the jurisdiction of the respective Federal and State commissions.

Public regulation of our railroads is performed in part by a commission representing the Federal Government and in part by commissions representing the various States. Conflicts of jurisdiction between the two systems of public regulation have arisen from time to time, resulting in litigation and action by the courts; but the Federal and State commissions were alike created in the public interest and have a common purpose, namely, the maintenance of a transportation system which will in all respects best meet the public needs. *In view of this common purpose they should, and we believe they can, work together for its attainment without conflict or resort to litigation. Such cooperation is contemplated by the interstate commerce act as interpreted by the Supreme Court, and is highly desirable in the public interest.*

The prime essential to such cooperation is realization of the nature and difficulties of the common problem. The State commissions realize that the railroads form a national transportation system and that the public interest demands a rate structure, State and interstate, as simple and harmonious as practicable. The Interstate Commerce Commission realizes that there is danger in overcentralization of authority, that the field of regulation is vast, and that the State commissions are often better informed than itself in regard to local conditions and local needs.

In one of its most important aspects, cooperation must look forward to and have in view the avoidance, so far as the public interest will permit, of orders under section 13 of the interstate commerce act, affecting intrastate rates.

Paragraph (3) of section 13 of the interstate commerce act authorizes the Interstate Commerce Commission to avail itself of the cooperation, services, records, and facilities of State commissions, to confer with them with respect to the relationship between rate

> structures and practices of carriers, and to hold joint hearings with them 'where the rate-making authority of a State is or may be affected by the action taken by the commission.' Our common purpose is to give the utmost force and effect to this provision of the law." (Emphasis supplied.)

This Court has held that the Interstate Commerce Commission has the power to construe and apply its findings and orders and to grant exceptions therefrom if found justified upon appropriate application. *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, 591. *Georgia Comm.* v. *United States*, 283 U. S. 765, 772. *Florida* v. *United States*, 292 U. S. 1, 13. *Lambert Co.* v. *Balt. & Ohio R. R. Co.*, 258 U. S. 377, 381, hereinafter referred to as the *Lambert Run case*. *Arkansas Comm* v. *Chicago, R. I. & P. R. R. Co.*, 274 U. S. 597, 603. *Penn. R. Co.* v. *Ills. Brick Co.*, 297 U. S. 447, 460. The general subject of the lack of power of state courts in the premises will be dealt with at length subsequently, but it should be noted at this point that state courts have no jurisdiction or power over rules or orders of the Interstate Commerce Commission. *Penn R. Co.* v. *Ills. Brick Co., supra. Lambert Run case, supra.* State courts are without power to construe an order of the Interstate Commerce Commission, since an order "may be as effectively annulled by misconstruction as by avowedly setting it aside." *American Express Co.* v. *Caldwell*, 244 U. S. 617, 628.

Petitioners' Exhibit 4 (R. 51, 92-134) is the report and order of the Interstate Commerce Commission of November 30, 1926, in the *Chicago Gravel case* issued in a joint hearing with the Illinois Commission involving sand and gravel rates in the territory covered, wherein the legal effect of their refusing to follow the suspension order of the Illinois Commission and their practice of collecting charges

in accordance with the order of the Interstate Commerce Commission was directly in issue. There the Interstate Commerce Commission (p. 639, R. 103-104) placed an authoritative and binding interpretation on its order in the *Chicago Producers case*. The same Commission also specifically rejected the contention of the complainants there, respondents here, that the finding and order in the *Chicago Producers case* did not apply to intrastate traffic from Zone I.

Under the Interstate Commerce Commission's interpretation of the order the local rate to Chicago from Zone I was 65 cents, which was the rate maintained for local shipment on the Chicago and North Western and the Milwaukee and the base rate to points beyond the rails of these respective railroads.

On page 640 of the report (R. 105) the Interstate Commerce Commission specifically found:

> "However, inasmuch as our order in the *Chicago Producers case* is still outstanding, the suspension order of the Illinois Commission did not become effective against the North Western and Milwaukee."

In two places (pp. 640 and 652; R. 105, 124) the Interstate Commerce Commission states that its order in the *Chicago Producers case* is still outstanding.

This specific finding of the Interstate Commerce Commission is waived aside by the Supreme Court of Illinois with the assertion herein (R. 233) that no issue was involved in the *Chicago Producers case* as to the legality or effect of the Illinois Commission's attempted suspension of the rate schedules.

Petitioners' Exhibit 6 (R. 51, 147-164), the concurrent order of the Illinois Commission dated November 30, 1926, in their Docket 15878, 15539, and 15191, the *Illinois Chicago*

Gravel case, the Illinois Commission's order entered on the record of the joint hearing held with the Interstate Commerce Commission in the *Chicago Gravel case,* shows that the Illinois Commission agreed with the interpretation of and the effect accorded the order in the *Chicago Producers case* by the Interstate Commerce Commission. This is clearly demonstrated by the Illinois Commission's order, wherein, after referring to conferences between the Illinois Commission, the Interstate Commerce Commission, and the Public Service Commission of Indiana, the Illinois Commission, on page 7 (Abst. 154-155), said:

> "The report and decision of the Interstate Commerce Commission which is issued concurrently with the order of this Commission and which was decided by both commissions on November 30, 1926, clearly sets forth the pertinent facts of record in this proceeding.
>
> The Interstate Commerce Commission, the Public Service Commission of Indiana, and the Illinois Commerce Commission have held several conferences in an endeavor to harmonize the interstate and intrastate rates. This, we believe, has been accomplished in such a way as to avoid the exaction of unjust, unreasonable or discriminatory rates."

The Illinois Commission further found that the charges collected were not unjust, unreasonable or unduly discriminatory. It denied the prayer for reparation (R. 156, 163), and fixed 65 cents as reasonable from Zone I, which was the exact measure of the base rate applied by petitioners during the period here involved. (R. 157) No effort was made on behalf of respondents to obtain a review of the Interstate Commerce Commission's order in the *Chicago Producers case* as construed and applied in the *Chicago Gravel case.* Cf. *Georgia Comm.* v. *United States,* 283 U. S. 765, at p. 772. Respondents, moreover, did not prosecute an appeal to Illinois courts from the Illinois Commission's

order issued concurrently with that of the Interstate Commerce Commission in the *Chicago Gravel case* under date of November 30, 1926. (Ex. 6; R. 52, 147-164) Respondents under date of September 21, 1928, filed a new complaint herein before the Illinois Commerce Commission reasserting the substance of the allegations of the complaint in the *Chicago Gravel case* in respect of the rate situation here presented. (R. 19-29)

It is manifest that the effect of the decision of the Supreme Court of Illinois is to sustain a collateral attack upon concurrent orders entered by the Interstate Commerce Commission and the Illinois Commerce Commission under authority of the Congress as contemplated by section 13 (3) of the Interstate Commerce Act. The direct result is to defeat the legislative policy and purpose of the Congress and to encourage and prolong litigation, this particular case dealing with transactions alleged to have occurred some fifteen years ago, and to grant by judicial fiat a preference in favor of respondents herein over and above all other parties to the joint proceeding before the Interstate Commerce Commission and the Illinois Commerce Commission in the *Chicago Gravel case.*

II.

THE SUPREME COURT OF ILLINOIS ERRED IN ASSERTING POWER TO REVIEW AND ANNUL DETERMINATIONS AND ORDERS OF THE INTERSTATE COMMERCE COMMISSION.

Examination of the order of the Illinois Commerce Commission entered under date of January 4, 1933, under review herein, shows that the Illinois Commission gave careful consideration to its jurisdiction and also to the jurisdiction accorded to the Interstate Commerce Commission over intrastate rates under provisions of the Interstate Commerce Act. (R. 2-17) The Illinois Commission found

(R. 14) that it had no power to review or set aside an order of the Interstate Commerce Commission, and that any contention that the order of the Interstate Commerce Commission in the *Chicago Producers case* was void should be addressed to the Interstate Commerce Commission or to the special United States District Court authorized by the United States statutes to entertain such questions.

The Supreme Court of Illinois, on the other hand, asserts the power and jurisdiction to review and annul orders of the Interstate Commerce Commission. This is evident from statements in the Court's opinion, in substance, that an order of the Interstate Commerce Commission will not be effective unless it conforms to a high standard of certainty; that it becomes necessary to determine whether the conditions exist upon which is dependent the right of the Interstate Commerce Commission to exercise its superior power, and that the orders contained findings having the legal effect attributed to them (R. 232-233). Moreover, the Supreme Court of Illinois held (R. 233) that no issue was involved in the *Chicago Gravel case* as to legality of rates charged or as to the effect of the attempted suspension by the Illinois Commission, and thus in effect annulled the following specific finding of the Interstate Commerce Commission:

> "However, inasmuch as our order in the *Chicago Producers case* is still outstanding, the suspension order of the Illinois Commission did not become effective against the North Western and Milwaukee." (R. 105, 124)

All these criteria made use of by the Illinois Supreme Court manifestly are elements of the power to review, set aside or annul,—a power under the law denied state courts.

That the finding of the Illinois Commission was right and the ruling of the Illinois Supreme Court was wrong,

is established by an unbroken line of decisions of this Court:

North Dakota v. *Chicago & N. W. Ry. Co.*, 257 U. S. 485;
Lambert Co. v. *Balt. & Ohio R. R. Co.*, 258 U. S. 377;
Venner v. *Mich. Cent. R. R. Co.*, 271 U. S. 127;
Penn. R. Co. v. *Ills. Brick Co.*, 297 U. S. 447;
Atlantic Coast Line v. *Florida*, 295 U. S. 301;
Lancaster v. *McCarty*, 267 U. S. 427;
Texas v. *Interstate Com. Comm.*, 258 U. S. 158;
Southern Pac. Co. v. *City of Willow Glen*, 49 Fed. (2d) 1005.

The legal principles adopted in the above cases likewise were recognized in Illinois until the decision of the Supreme Court of that state in the instant case. *The People* v. *Illinois Cent. R. R. Co.*, 324 Ill. 591; certiorari denied, 275 U. S. 541; *St. Louis Connect. R. R. Co.* v. *Blumberg*, 325 Ill. 387.

In the recent case of *Penn. R. Co.* v. *Ills. Brick Co., supra*, decided March 2, 1936, this Court held that an order of the Illinois Commission awarding reparation on shipments of brick from Bernice, Ill., to the Chicago switching district was void in so far as it related to a period when the intrastate rates were covered by an order of the Interstate Commerce Commission. For a long time the rate on brick from Bernice to the Chicago switching district and the rate within the switching district was 25 cents per ton. During the period of general rate changes during the war and thereafter there were marked changes in these rates and the relationship between the state and interstate rates became disrupted. Under date of January 11, 1921, the Interstate Commerce Commission entered an order re-

quiring the general level of intrastate rates in Illinois to be adjusted to the interstate level. These increased intrastate rates became effective February 19, 1921. On that date along with thousands of other intrastate rates the intrastate rate on brick from Bernice to the switching district was increased and the result was it became 98 cents and the rate between points within the district 42 cents. Under date of October 26, 1921, in a formal complaint case the Interstate Commerce Commission found that the interstate rate from Bernice was not unreasonable but it would be unduly prejudicial to the extent that it exceeded the rate on brick within the switching district by more than 10 cents per ton. The rate was required to be readjusted on or before February 16, 1922. In compliance with this order the carrier made effective on February 16, 1922, a rate of 50 cents per ton for intrastate and interstate transportation from Bernice into the switching district and between points within it.

Thereafter the Illinois Commission awarded reparation to the Illinois Brick Company on intrastate traffic for a period including the period February 19, 1921, the effective date of the Interstate Commerce Commission's order dealing with intrastate rates, to February 16, 1922, when the rate became 50 cents as the result of the order of the Interstate Commerce Commission.

This Court in holding that the Illinois Commission had no power to award reparation subsequent to February 19, 1921, said (p. 459), "To the extent, if at all, that there is conflict between state and federal regulation, the latter must prevail." The Court pointed out that during that period the intrastate rates from Bernice to the switching district were maintained by the railroad pursuant to and in accordance with the Interstate Commerce Commission's order of January 11, 1921, and that its direction to the car-

riers to collect charges based on the intrastate rates required by the order was *mandatory,* and further, that in order that the prescribed equality between intrastate and corresponding interstate rates should not be disturbed by state authority or by action of the carriers, "the commission declared that the order—and necessarily the rates directed—should continue in force until changed by it." The Court made clear that the order of January 11, 1921, established a rule of equality between rates for interstate and intrastate transportation and the railroad was required to maintain this equality, and that there was nothing in the report and order of October, 1921, which resulted in the reduction of the rate to 50 cents effective February 16, 1922, to indicate an intention on the part of the Commission to authorize or permit a change "of the one without a like change in the other." The Court said (p. 461):

> "The purpose, by exertion of federal authority to control both, persisted. The state commission was not, at any time after the intrastate rates were established under federal authority, authorized to condemn them or to award reparation in respect of transportation to which they applied."

With respect to the binding force of rates resulting from a relationship ordered by the Interstate Commerce Commission the court (p. 460) said:

> *"Save as the rate so prescribed might be dealt with under federal law, the carriers were bound to collect the charges based upon them. By the Interstate Commerce Act and that order, the State was divested of jurisdiction, by specific order, award of reparation or otherwise, to reduce the charges based on the intrastate rates so established. The order of the Illinois commission, in so far as it awards reparation in respect of transportation covered by rates that petitioner was required to put in force and maintain by the Interstate Commerce Commission's order of January 11,*

1921, is plainly repugnant to the Interstate Commerce Act and to that order." (Emphasis supplied.)

It will be noted that in the case just analyzed an attempt of the Illinois Commission to award reparation was held by this Court to be unlawful and beyond its powers. The case demonstrates most clearly and beyond all question that the order of the Illinois Commission herein denying reparation to respondents is correctly grounded in the law, and, indeed, the only order that lawfully could be entered.

In *North Dakota* v. *Chicago & N. W. Ry. Co., supra,* the State of North Dakota filed in the Supreme Court of the United States a bill in equity against certain named railroads to prevent their putting into effect an order of the Interstate Commerce Commission increasing intrastate rates within North Dakota. The court held that the suit was one to set aside or suspend an order of the Interstate Commerce Commission, and therefore by section 211 of the Judicial Code the United States must be a party, and that the United States has consented to be sued only in the district court of the United States where such suits are required to be brought (Judicial Code, Sec. 208; Act of Oct. 22, 1913, chap. 32, 38 Stats. 219).

The *Lambert Run case* is a leading case to which reference was made on page 639 of the Interstate Commerce Commission's report in the *Chicago Gravel case* (Ex. 4; R. 51, 103). In the *Lambert Run case* a coal operator brought a suit in one of the state courts of West Virginia praying that the defendant railroad be restrained from observing its rules with regard to car distribution. The cause was removed to the Federal court for the Northern District of West Virginia. In its answer the railroad, among other things, alleged that the rules against which the suit was

directed had been promulgated by the Interstate Commerce Commission. The District Court granted an interlocutory injunction, which was reversed on appeal by the Circuit Court of Appeals. The Court held that since the suit essentially was one to set aside or annul an order of the Interstate Commerce Commission the state court never had jurisdiction and the United States District Court acquired none by removal, since the only court having jurisdiction was the special United States district court consisting of three judges. This Court (pp. 381, 382) said:

> "The rule of the railroad here complained of was that prescribed by the Commission. *To that rule the railroad was bound to conform unless relieved by the Commission or enjoined from complying with it by decree of a court having jurisdiction.* By this suit such a decree was in effect sought. The appellate court was therefore correct in holding that in such a suit an injunction of the District Court could be granted only by three judges.
>
> But there are in addition two fundamental objections to the jurisdiction. First, the United States, an indispensable party to suits to restrain or set aside orders of the Commission, was not joined, and could not be, for it has not consented to be sued in state courts. Secondly, such suits are required to be brought in a federal District Court. Judicial Code, Sec. 208, 211; Act of October 22, 1913, c. 32, 38 Stat. 208, 219. * * * The fact that this was a suit to set aside an order of the Commission did not appear on the face of the bill; but it became apparent as soon as the motion to dismiss was filed. Jurisdiction cannot be effectively acquired by concealing for a time the facts which conclusively establish that it does not exist. As the state court was without jurisdiction over either the subject-matter or the United States, the District Court could not acquire jurisdiction over them by the removal." (Emphasis supplied.)

The particular attention of the Court is invited to the principle stated in the above quotation that a railroad must conform to an order of the Interstate Commerce Commission unless relieved by that Commission itself or enjoined by a decree of the court having jurisdiction, which court can only be a special United States district court of three judges.

Venner v. *Mich. Cent. R. R. Co., supra,* likewise was cited by the Interstate Commerce Commission in the *Chicago Gravel case.* There this Court affirmed a decree of the district court dismissing an injunction suit for want of jurisdiction. As in the *Lambert Run case,* the suit was begun in a state court and then removed to the United States district court. The suit was brought by a minority stockholder of a railroad to enjoin it from carrying out an agreement and arrangement with respect to the purchase of locomotives, which arrangement had been authorized by the Interstate Commerce Commission. The bill alleged, among other things, that the proposed arrangements would be in violation of the laws of the state in the absence of approval by state authorities, and that such approval had not been obtained. This Court held that the state court was without jurisdiction and the district court acquired none by removal. This Court (pp. 130-131) said:

> "We agree with the court below that the suit is essentially one to annul or set aside the order of the Commission. While the amended bill does not expressly pray that the order be annulled or set aside, it does assail the validity of the order and pray that the defendant company be enjoined from doing what the order specifically authorizes, which is equivalent to asking that the order be adjudged invalid and set aside. *Lambert Run Coal Co.* v. *Baltimore & Ohio R. R. Co.,* 258 U. S. 377, 380, 382. Such a suit must be brought against the United States as the representative

> of the public and may be brought only in a federal district court. Judicial Code, sec. 208, 211; Act of October 22, 1913, c. 32, 38 Stat. 219; * * * That the order is not mandatory but permissive makes no difference in this regard. * * * And as the state court was without jurisdiction the federal court acquired none by the removal."

The *Houston & Texas case,* more commonly known as the *Shreveport case,* is one of the landmarks of railroad rate regulation. In it this Court sustained against direct attack in the then Commerce Court of the United States an order of the Interstate Commerce Commission which had the effect of authorizing an increase of certain intrastate rates. The Supreme Court (p. 360) said:

> "Reading the order in the light of the report of the Commission, it does not appear that the Commission attempted to require the carriers to reduce their interstate rates out of Shreveport below what was found to be a reasonable charge for that service. So far as these interstate rates conformed to what was found to be reasonable by the Commission, the carriers are entitled to maintain them, and they are free to comply with the order by so adjusting the other rates, to which the order relates, as to remove the forbidden discrimination. *But this result they are required to accomplish."* (Emphasis supplied.)

It will be noted that the railroads were bound to establish the relationship fixed by the Interstate Commerce Commission's order, but they had the choice of increasing the intrastate rates instead of reducing the interstate rates. With respect to maintaining the required rate relationship the order was *mandatory.*

Concerning the paramount effect to be accorded the standard of rates fixed by the Interstate Commerce Commission, the agency of Congress, attention is invited to what the Supreme Court has said at page 355 of the *Shreveport case*:

> "It is also clear that, in removing the injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard fair to the carrier and to the public. Otherwise, it could prevent the injury to interstate commerce only by the sacrifice of its judgment as to interstate rates. Congress is entitled to maintain its own standard as to these rates and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes."

Lancaster v. *McCarty, supra,* is a case making clear what might be referred to as the indirect but nevertheless decisive effect of an order of the Interstate Commerce Commission. The case was a suit for damages brought in one of the County Courts of the state of Texas to recover from the Receivers of the Texas & Pacific Railway damages for injury to certain furniture shipped over the railway. The issue before the Court was whether damages for the admitted injury should be measured by the statutory law of Texas or by regulations of the Interstate Commerce Commission with respect to the classification of traffic and fixing of rates as directed by it in accordance with the proceedings affirmed by this Court in the *Shreveport case.*

The shipment moved intrastate in Texas, *i. e.,* from Fort Worth, Texas, to Cisco, Texas. Judgment for the shipper and against the railroad was sustained by the Texas Court of Civil Appeals. This Court reversed the Court of Civil Appeals and held that the regulations of the Interstate Commerce Commission superseded the statute of Texas. The Court said (p. 431):

> "This Western Classification, which the carrier applied in this case, was adopted by the railroads under

the authority of the Interstate Commerce Commission thus sustained in the *Shreveport Case.* That authority rested on the supremacy of federal authority in respect to interstate commerce. The intrastate rates fixed by the Texas State Railway Commission from Houston and Dallas eastward to Texas points were a discrimination against the interstate traffic between Shreveport and those same points; and, therefore, it was held to be within the power of the Interstate Commerce Commission, in preventing such unlawful discrimination under the Interstate Commerce Act, *to direct the railways to ignore the Texas Commission rates and to establish rates, not unduly discriminating against interstate commerce, in intrastate traffic. Such an order of course, included classification as well as rates. The two are so bound together in the regulation of interstate commerce that the effect of both must be reasonable and without undue discrimination.* The Interstate Commerce Commission, therefore, had full authority to issue this order for the adoption of the Western Classification for intrastate points between Houston and Cisco, both in Texas. The conflict between the revised Statutes of Texas and the order of the Interstate Commerce Commission can only be settled by recognition of the supremacy of the federal authority." (Emphasis supplied.)

The Illinois Commission gave effect to the order of the Interstate Commerce Commission as required by its plain words and the construction placed upon it by the Interstate Commerce Commission in the *Chicago Gravel case* and by the Illinois Commission in its report issued in the joint hearing in that case. This was in accordance with law, since neither state commissions nor state courts have the power of jurisdiction to set aside an order of the Interstate Commerce Commission, either directly or indirectly, by a process of interpretation. It was distinctly so held in *American Express Co.* v. *Caldwell,* 244 U. S. 617, 628, where

this Court, in denying state jurisdiction in respect of such matters, said, "An order may be as effectively annulled by misconstruction as by avowedly setting it aside."

By way of emphasis defendants invite the attention of the Court again to *Penn. R. Co.* v. *Ills. Brick Co.*, 297 U. S. 447, wherein at page 460 this Court stated in positive terms that when an intrastate rate is prescribed by order of the Interstate Commerce Commission, "Save as the rate so prescribed might be dealt with under federal law, the carriers were bound to collect the charges based upon them."

The binding effect of orders of the Interstate Commerce Commission is clearly explained and established in *Atlantic Coast Line* v. *Florida*, 295 U. S. 301. There this Court reversed the decree of the District Court of Florida awarding restitution to certain shippers for freight charges which had been collected under authority of an order of the Interstate Commerce Commission, which later had been declared void by this Court in a direct action brought in a special United States district court in accordance with United States statutes. The district court had sustained the Interstate Commerce Commission's order. This Court later reversed the district court and set aside the Commission's order on the ground that the order was void because the findings of the Commission were incomplete and inadequate. In the meantime, however, the railroad, under authority of the order of the Interstate Commerce Commission, had charged rates which were higher than those which had theretofore been in effect by state authority.

After referring to the fact that the order had been held void by this Court because of insufficient findings, the court (p. 311) said:

> "The carrier was not at liberty to take the law into its own hands and refuse submission to the order without the sanction of a court. It would have exposed

itself to suits and penalties, both criminal and civil, if it had followed such a path. See, *e. g.*, Interstate Commerce Act, 49 U. S. C., Sec. 16 (8) (9) (10) (11). *Obedience was owing while the order was in force.*" (Emphasis supplied.)

Atlantic Coast Line v. *Florida, supra,* was cited with approval by this Court in *United States* v. *Morgan,* 307 U. S. 183.

From the foregoing authorities it is manifest that there is no legal obligation to comply with state statutes or tariff rules and regulations as a condition prerequisite to charging rates authorized by an order of the Interstate Commerce Commission. In *American Express Co.* v. *Caldwell,* 244 U. S. 628, this Court distinctly so held. The court observed that a valid order of the Interstate Commerce Commission is a legal justification for disregarding a conflicting regulation of the state law because the federal authority is dominant. In this case, as has been pointed out above, the Interstate Commerce Commission's order was held applicable by that commission itself, and the Illinois Commission concurred in that interpretation of the order. The Interest Commerce Commission's order was valid, but whether valid or invalid cannot be made a subject of inquiry in this proceeding.

It clearly appears, therefore, that in any view of the situation the order of the Interstate Commerce Commission was binding upon the railroads and the Illinois Commission was right in finding that it had no power to set aside the order retroactively by an award of reparation. It is equally clear also that state courts likewise are without such power and the order of the Illinois Commission should be sustained.

III.

THE DECISION OF THE SUPREME COURT OF ILLINOIS IS VIOLATIVE OF PRINCIPLES APPLIED AND EMPHASIZED BY THE COURT IN U. S. v. CHICAGO HEIGHTS TRUCKING CO., — U. S. —, May 20, 1940, THAT THE INTERSTATE COMMERCE COMMISSION AND THE ILLINOIS COMMISSION ARE EXPERT BODIES INFORMED BY EXPERIENCE AND THEIR ACTS ARE THOSE OF PUBLIC AGENCIES CARRYING OUT DUTIES IMPOSED BY THE CONGRESS IN THE INTEREST OF SHIPPERS GENERALLY, THE NATIONAL TRANSPORTATION SYSTEM AND THE PUBLIC INTEREST.

THIS CASE DOES NOT REPRESENT MERE PRIVATE LITIGATION. IT IS ONE IN WHICH THE PUBLIC HAS A VITAL INTEREST IN ORDER THAT, AMONG OTHER THINGS, THE RULE OF UNIFORMITY IN CHARGES BE APPLIED AND CREATION OF PREFERENCES AND DISCRIMINATIONS PREVENTED.

The decision of the Supreme Court of Illinois gives no effect to the principle that both the Interstate Commerce Commission and the Illinois Commission in law are regarded as expert and informed administrative bodies,* and in holding the joint hearing under section 13 (3) of the Interstate Commerce Act and in entering their concurrent orders of November 30, 1926, acted as public agencies. *U. S. v. Chicago Heights Trucking Co., supra.*

The rule is, as stated in the *Lambert Run case,* among other authorities, that in suits involving orders of the Interstate Commerce Commission the United States as the representative of the public is an indispensable party and it can be sued only in a special United States District

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* This rule has long been recognized and followed. Other authorities recognizing and applying this rule are: *Rochester Tel. Corp.* v. *U. S.* 307 U. S. 125. *Standard Oil Co.* v. *United States,* 283 U. S. 235. *Humphrey's Executor* v. *U. S.,* 295 U. S. 602. *Ill. Cent. R. R.* v. *Inter. Com. Comm.,* 206 U. S. 441. *Miss. Valley Barge Co.* v. *U. S.,* 292 U. S. 282, 286. *Palmyra Co.* v. *Modesto Co.,* 336 Ill. 158, 165. *Commerce Com.* v. *C. C. C. & St. L. Ry. Co.,* 309 Ill. 165, 170. *S. Chicago Coal Co.* v. *Commerce Com.,* 365 Ill. 218.

Court. The underlying reason for this statutory rule is that as a matter of public policy a carrier cannot be permitted to be in a position to give preferences by means of consent judgments or waiver of available defenses. *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, 667. By the United States being an indispensable party, it is made possible for such suits to be defended by the representatives of the public at large instead of being left to railroads who are subject to the pressure of interested shippers.

From the foregoing principle it follows that when petitioners were confronted with a repetitious complaint filed by the same parties, respondents herein, they were justified in introducing of record and relying upon the reports and orders of the Interstate Commerce Commission and the Illinois Commission concurrently entered under date of November 30, 1926, in which the order of the Interstate Commerce Commission in the *Chicago Producers case* was construed and applied and all issues involved herein determined adversely to respondents.

Since the concurrent orders of the two Commissions of November 30, 1926, were entered by the two Commissions upon a record made at a joint hearing authorized by section 13 (3) of the Interstate Commerce Act, it would manifestly have been a gross impropriety for petitioners to be parties to an attempted retrial of the same issues on a subsequent record not made in the presence of the Interstate Commerce Commission. And petitioners respectfully submit that there is no principle of law which authorizes state courts to compel a retrial of such questions in the absence of the Interstate Commerce Commission.

The concurrent reports and orders of the Interstate Commerce Commission (Ex. 4; R. 51, 93-134) and of the Illinois Commerce Commission (Ex. 6; R. 52, 147-164) in the proceeding contemplated by section 13 (3) of the Interstate

Commerce Act, must be accepted as a complete answer to the complaint herein. If it were possible under the law to keep retrying cases of this kind, it is clear that the way would be open for carriers to single out favored shippers by making an incomplete presentation of evidence in a given case.

The public concern in a situation of the kind here presented, as evidenced by statutes of the Congress, is clearly expressed in the following from page 383 of the decision of the Supreme Court in the *Lambert Run case*:

> "And the vital interest of the United States was one which the plaintiff could neither ignore nor prejudice by indirection."

In the same connection, this Court at page 490 of the decision in *North Dakota* v. *Chicago & N. W. Ry. Co.*, 257 U. S. 485, said:

> "The language of the section shows that public interests were before the mind of Congress, and that in its opinion an order made in the public interest should not be hindered from going into effect until the representative of the public had been heard."

The Court is respectfully reminded that this record shows that the judgment of the Supreme Court of Illinois would operate to prefer respondents by reducing retroactively the Zone I rate *only on their* alleged shipments from 65 cents to 60 cents. The rate from Zone I on traffic of *all other* intrastate shipments from points on the Chicago and North Western and the Milwaukee would remain at 65 cents, and the rate from Zone II for all intrastate shippers would remain at 70 cents, the same as the contemporaneous interstate rate (R. 123-124, 157-158), *all of which the concurrent orders entered on November 30, 1926, by the Interstate Commerce Commission and the Illinois Commission, acting*

as public agencies in the interest of shippers generally, prohibited.

IV.

THE LAW DOES NOT PERMIT THE COURT TO LAY ASIDE AS WITHOUT EVIDENTIARY FORCE REPORTS AND ORDERS OF THE INTERSTATE COMMERCE COMMISSION AND OF THE ILLINOIS COMMERCE COMMISSION INTRODUCED OF RECORD.

In the opinion of the Illinois Supreme Court herein it is stated (R. 232-233):

> "In short, to establish their defense to the complaint, it was incumbent upon the defendants to prove the fact that an order had been entered in the *Chicago Producers case* on September 23, 1921, which contained findings having the legal effect attributed to them. The only authoritative evidence of this requisite fact was the decision and order of the Interstate Commerce Commission itself."

The foregoing quotation suggests several misapprehensions on the part of the Illinois Supreme Court as to what must be regarded as evidence of record and as to the powers of state courts, viz.: (1) That state courts have power to review and pass upon the adequacy of findings of fact in orders of the Interstate Commerce Commission, a repetition of the error pointed out above; (2) that to defend a repetitious complaint defendants are required to retry a previous proceeding determined adversely to complainants; (3) that the report and order of the Interstate Commerce Commission in the previous case, even when as here introduced of record, is not entitled to be treated as evidence; and (4) that litigation of this kind is merely private in character and not clothed with a public interest.

The report and order introduced of record was entered by the Interstate Commerce Commission in a hearing held

under specific authority of section 13 (3) of the Interstate Commerce Act, in which hearing the subject matter herein was investigated by the Interstate Commerce Commission and by the Illinois Commission and, under date of November 30, 1926, contemporaneous reports and orders entered. There the Interstate Commerce Commission (Ex. 4; R. 51, 103-105, 124), with the concurrence of the Illinois Commerce Commission (Ex. 6; R. 147-164), construed and applied its report and order in the *Chicago Producers case.* It is well established that there are only two bodies that have jurisdiction in the first instance to construe or set aside an order of the Interstate Commerce Commission, viz., the Commission itself or the specially constituted United States District Court. See, among other cases, the *Lambert Run case,* p. 381, and cases cited above under points I and II. In the case in hand, upon petition of respondents herein, the Interstate Commerce Commission reexamined and confirmed its previous action and its report and order is in evidence herein (Ex 4; R. 51, 93-134). There is no principle of law which permits a state court to waive aside the Interstate Commerce Commission's report and order as wholly without evidentiary value, particularly where, as here, it was based on a proceeding authorized by the Congress in section 13 (3) of the Interstate Commerce Act.

The Supreme Court of Illinois likewise was in error in giving no consideration to the order of the Illinois Commerce Commission in its Docket 10666 (Ex. 7; R. 52, 165-195). Petitioners respectfully invite the attention of the Court to the fact that inspection of that order (R. 52, 165-195) shows that by agreement of all parties the record made before the Interstate Commerce Commission in the *Chicago Producers case* was made a part of the record in the proceeding known as Illinois Commission Docket No. 10666, and the Illinois Commission dealt with the rate re-

lationship prescribed in that proceeding and reaffirmed by the Interstate Commerce Commission in *Chicago Gravel case.* (Ex. 4; R. 51) As already suggested, there is no principle of law that requires an administrative body continually to keep retrying matters of this kind.

The Illinois Supreme Court's complete blackout of the documentary evidence introduced by petitioners is unsupported by precedent, either state or Federal. In *A. T. & S. F. Ry. Co.* v. *Commerce Com.*, 335 Ill. 624, at page 645 the decision of that Court indicates positively that reports and orders which are introduced physically into the record or evidence of the contents thereof introduced of record must be considered.

The subject of practice and evidence before administrative bodies recently has been given attention by this Court. *Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125. *Federal C. C.* v. *Pottsville Broadcasting Co.*, ... U. S. ....., 84 L. Ed. 361. *Nat'l Labor Rel. Bd.* v. *Waterman Steamship Corp'n*, ... U. S. ....., 84 L. Ed. 448. In the *Rochester Telephone case,* at page 125, the Court said:

> "Recognition of the Commission's expertise also led this Court not to bind the Commission to common law evidentiary and procedural fetters in enforcing basic procedural safeguards."

Again, in the *Pottsville Broadcasting case* this Court said:

> "These differences in origin and function preclude wholesale transplantation of the rules of procedure, trial and review, which have evolved from the history and experience of courts. Thus, this Court has recognized that bodies like the Interstate Commerce Commission, into whose mould Congress has cast more recent administrative agencies, 'should not be too narrowly constrained by technical rules as to the admis-

> sibility of proof,' *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 44, 48 L. Ed. 860, 869, 24 S. Ct. 563, should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multudinous duties."

That case was cited recently by this Court in *Perkins* v. *Lukens Steel Co.*, ... U. S. ....., 84 L. Ed. 743, where judicial interference with administrative determinations was disapproved.

In the *Waterman Steamship case* this Court in a unanimous decision held that courts are not empowered to review or interfere with determinations of administrative bodies on questions of fact.

The same principle is included in Illinois statutory law, Section 64, Chapter 111-2/3, Illinois Revised Statutes, 1939, providing:

> "In the conduct of any investigation, inquiry or hearing neither the Commission nor any commissioner, assistant commissioner or officer of the Commission shall be bound by the technical rules of evidence and no informality in any proceeding or in the manner of taking testimony before the Commission, any commissioner, assistant commissioner or an officer of the Commission shall invalidate any order, decision, rule or regulation made, approved, or confirmed by the Commission."

The rules of procedure and evidence insisted upon by the Supreme Court of Illinois herein are decidedly technical and represent departures from the principles announced in the Illinois statute just cited and in decisions of this Court relating to administrative agencies and their methods of inquiry necessarily made use of by them in discharging their large and complex duties and responsibilities entrusted to them by law. Their responsibilities cannot be discharged with dispatch and with uniformity, particularly

those under section 13 (3) of the Interstate Commerce Act, if determinations and orders once made are not considered evidence in future proceedings and dissatisfied litigants are permitted, by the simple device of filing a new and repetitious complaint, to obtain collaterally a review of proceedings to which they were parties.

Petitioners respectfully submit that the order of the Illinois Commerce Commission of January 4, 1933, dismissing the complaint herein is amply supported by wholly undisputed evidence which the courts of Illinois have no right to disregard. *U. S.* v. *Chicago Heights Trucking Co.*, ... U. S. ....., May 20, 1940.

V.

UNDER SIMILAR CIRCUMSTANCES THE ABSENCE OF STATE JURISDICTION HAS BEEN DETERMINED ON THE PLEADINGS.

The opinion of the Supreme Court of Illinois herein, after according recognition to the fact (R. 235) that the proceedings before the Interstate Commerce Commission including the joint proceedings with the Illinois Commission under authority of Section 13 (3) of the Interstate Commerce Act, were disclosed in petitioners' amended answer and motion to dismiss*, observes that this is in effect an argument that a finding prerequisite to the validity of the order of the Commission may be supplied by implication. The opinion then asserts that an express finding was indispensable. This amounts to a repetition of the previous error of the court heretofore pointed out, *i. e.*, the assumption that state courts have the power and jurisdiction to

* Respondents' reply under date of November 21, 1928, included no denial that the Interstate Commerce Commission's order in the *Chicago Producers case* was issued and was continuing in character. The reply in its nature was one of confession and avoidance, in that it asserted that the order was silent in regard to Illinois inner zone rates and the order was void.

review orders of the Interstate Commerce Commission and to pass upon the adequacy of the findings contained in such orders. *Wichita R. R.* v. *Public Util. Comm.*, 260 U. S. 48, cited in the opinion does not sustain what appears to be the Illinois Supreme Court's view as to the law. No action of the Interstate Commerce Commission was involved in that case, and it lends no support to the doctrine asserted by the Supreme Court of Illinois that state courts have the power to review findings and orders of the Interstate Commerce Commission.

In this connection the Court's attention is respectfully invited to the *Lambert Run case and Penn. R. Co.* v. *Ills. Brick Co.*, 297 U. S. 447. In each of these cases the state courts or commission was found without jurisdiction in the premises and the *decision was based upon the pleadings.* In the *Illinois Brick case* this Court set aside a reparation order of the Illinois Commerce Commission amounting to $44,428.09, and, as shown by the opinion, the decision was based upon "a question *raised by the answer* and decided by the Appellate Court, the highest court of the state in which a decision could be had."

This Court's attention is invited to the fact that in each of the cases just cited the decision turned on the fact that there was an outstanding order of the Interstate Commerce Commission controlling the situation involved. Whether the order of that Commission was adequately supported by evidence and findings of fact, apparently was not considered a question which could be presented, and it was not discussed by this Court in either of the opinions, indeed, it was not even noted.

Uncontroverted allegations of the pleadings were accorded weight by this Court as a basis for deciding *Stoll* v. *Gottlieb*, 305 U. S. 165, 168.

The opinion of the Supreme Court of Illinois herein states that the jurisdiction of the Illinois Commission cannot be defeated, either by assertions of the petitioners or by the failure of respondents to deny assertions in the pleadings. This statement overlooks the controlling legal principle that the paramount jurisdiction and authority of the Interstate Commerce Commission cannot be defeated nor its orders set aside by indirection. In the *Lambert Run case* this Court specifically held that jurisdiction to set aside an order of the Interstate Commerce Commission cannot be effectively acquired by concealing for a time the facts which conclusively establish that it does not exist.

VI.

RESPONDENTS' CAUSE IS BARRED BY THE PRINCIPLE OF ADMINISTRATIVE FINALITY.

In *Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125, this Court at pages 139-140, with respect to the doctrine of administrative finality, said:

> "Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority, and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable."

In connection with the foregoing quotation petitioners invite the attention of the Court to the fact that this Court was there referring to proceedings in which an order of an administrative body is under direct review in the manner provided by statute. In the case in hand neither the order of the Interstate Commerce Commission of November 30, 1926 (Ex. 4; R. 51, 93-134) nor the order of the

Illinois Commerce Commission of the same date (Ex. 6; R. 52, 147-164) is or can be reviewed in this proceeding. They must be accepted as written and cannot be set aside collaterally.

The foregoing principle is written in the Illinois statutes, Section 72, Chapter 111-2/3, Illinois Revised Statutes, 1939, providing that when no appeal is taken from an order or decision of the Commission the parties affected by such order or decision shall be deemed to have waived the right to have the merits of the controversy reviewed by a court. Until the decision in the instant case the Supreme Court of Illinois has applied that principle so as to prevent a collateral attack on orders of the Illinois Commission. *C. N. S. & M. R. R. Co.* v. *City of Chicago,* 331 Ill. 360. *Hoyne* v. *Chi. & Oak Park El. R. R. Co.,* 294 Ill. 413. In this case, however, the Supreme Court of Illinois erroneously sustains a collateral attack on the Illinois Commission's concurrent order of November 30, 1926.

Respondents herein admittedly (R. 50-51) were parties to the joint proceeding before the Interstate Commerce Commission and the Illinois Commission which culminated in the concurrent orders of November 30, 1926. Six of the respondents (R. 165-173) were parties to the proceeding which resulted in the Illinois Commission's report and order in the *Illinois Chicago Producers case.* (Ex. 7; R. 52, 155, 173.)

What has been said above in respect of identity of parties is to be considered as informative rather than suggesting that in a situation of this kind identity of parties is necessary. In legal contemplation the result would be the same even though none of respondents herein had been parties to the proceeding described. The rule is as laid down by the Circuit Court of Appeals, Second Circuit, in *Aron* v. *Pennsylvania R. Co.,* 80 Fed. (2d) 100; certiorari

denied 298 U. S. 658, that a determination between a railroad and one shipper is final and binding in a case involving the same issues, even with a different shipper.

The same principle was announced by this Court in *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, wherein it was held that a finding and order of the Interstate Commerce Commission inured to all shippers concerned with the same rates even though not parties to the proceeding. The basis of this principle is that litigation of this kind is not private in character but a matter of public concern in which the whole body of shippers is interested. To relate the effect of such a proceeding only to the parties thereto would result in discriminations and a lack of uniformity between shippers.

Under this doctrine, therefore, all shippers similarly situated are bound by the reports and orders of the Interstate Commerce Commission and the Illinois Commission in the *Chicago Gravel cases* and by the report and order of the Illinois Commission in the *Illinois Chicago Producers case.*

Attention is invited to *Stoll* v. *Gottlieb,* 305 U. S. 165, wherein this Court on certiorari reversed the judgment of the Supreme Court of Illinois in 368 Ill. 88. There the United States District Court in a proceeding to reorganize a corporation under section 77B of the Bankruptcy Act approved a plan providing, among other things, for the discharge of certain bonds and cancellation of a personal guaranty. A party who had appeared in the proceedings before the United States District Court later in the state court obtained judgment on the guaranty. No appeal had been taken from the orders of the United States District Court. This Court held that the proceedings in the United States District Court were *res judicata,* saying (p. 172):

> "Courts to determine the rights of parties are an integral part of our system of government. It is just

> as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first."

Although *Stoll* v. *Gottlieb* relates to the strict legal doctrine of *res judicata,* it has particular application here and supports the view that all questions here involved were finally determined by the two administrative tribunals, the Interstate Commerce Commission and the Illinois Commerce Commission, and are not subject to review by the courts. See also *Union Joint Stock Land Bank* v. *Byerly,* — U. S. —, 84 L. Ed. 689.

Application of this principle is particularly of consequence in this case because the alleged subject matter took place nearly fifteen years ago and petitioners in the meantime have come under the jurisdiction of the United States District Court, Northern District of Illinois, Eastern Division, for reorganization under the Bankruptcy Act, as amended. *Chicago & N. W. Ry. Co. Reorganization,* 230 I. C. C. 548.

VII.

RESPONDENTS' PETITION FOR REHEARING FILED WITH THE ILLINOIS COMMISSION RAISED NO QUESTION AS TO THE SUFFICIENCY OF THE EVIDENCE IN RESPECT OF THE INTERSTATE COMMERCE COMMISSION'S REPORT AND ORDER IN THE CHICAGO PRODUCERS CASE.

On February 1, 1933, respondents filed with the Illinois Commission a petition for rehearing. (R. 87-90.) In respect of the Interstate Commerce Commission's report and order in the *Chicago Producers case* this petition states that it is " * * * the contention of these complainants

that the order of the Interstate Commerce Commission in Docket 11490, September 23, 1921, 64 I. C. C. 37, upon which defendants rely, was illegal and void because no findings of undue prejudice to interstate commerce were made by the federal Commission."

Petitioners joined issue with respondents by filing under date of February 9, 1933, an answer to respondents' petition for rehearing in which it was alleged that the Illinois Commission had no jurisdiction or power to sit in judgment on orders of the Interstate Commerce Commission. (R. 91)

The Illinois Commission denied respondents' petition by order entered under date of February 15, 1933. (R. 91)

Section 71, Chapter 111-2/3, Illinois Revised Statutes, 1939, provides that an application for rehearing, together with action thereon by the Illinois Commission, is a jurisdictional prerequisite to an appeal from any order or decision of the Commission.

The law is well established that no point can be raised in court as a ground for setting aside an order of an administrative body unless it has first been presented to that body. *Red "C" Oil Co.* v. *North Carolina,* 222 U. S. 380. *Chicago, etc. R. R.* v. *Risty,* 276 U. S. 567. *Petersen Baking Co.* v. *Bryan,* 290 U. S. 570. *City of Elmhurst* v. *Western Gas Co.,* 363 Ill. 144.

VIII.

UPON THIS RECORD AND ON AUTHORITY OF ATLANTIC COAST LINE v. FLORIDA, 295 U. S. 301, THERE IS NO LEGAL THEORY SUPPORTING THE JUDGMENT REQUIRING PETITIONERS TO REDUCE RETROACTIVELY RATES APPROVED BY THE INTERSTATE COMMERCE COMMISSION AND THE ILLINOIS COMMISSION IN CONCURRENT ORDERS.

Respondents do not contend that the rates involved herein were unreasonable. Upon this admission the rates, there-

fore, must conclusively be regarded as reasonable for transportation service furnished.

There is no issue or evidence of record to support the judgment of the Supreme Court of Illinois directing the Illinois Commission to award restitution.

In view of this state of the record, there is no legal theory upon which respondents could prevail. Petitioners in connection with the preceding point herein anaylzed *Atlantic Coast Line* v. *Florida*, 295 U. S. 301, wherein this Court held that shippers were not entitled to restitution for rates charged under authority of an order of the Interstate Commerce Commission which was found void as the result of a direct attack in the manner provided by the United States statutes. *Atlantic Coast Line* v. *Florida* was cited with approval in *United States* v. *Morgan*, 307 U. S. 183.

In *Atlantic Coast Line* v. *Florida* this Court held that in order to recover it was incumbent upon the shippers to show that the rates fixed by the Commission in the void order were *unreasonable*. Applying this principle, it is apparent that under no circumstances can respondents recover anything by way of reparation, because it is conclusively admitted that they were charged reasonable rates.

To the same effect also is *Aron* v. *Pennsylvania R. Co.*, 80 Fed. (2d) 100. Certiorari denied 298 U. S. 658, wherein the United States Circuit Court of Appeals, Second Circuit, affirmed the judgment of the lower court dismissing a suit brought by certain shippers against a railroad to recover certain charges paid for servicing livestock at stockyards. The suit was based on the theory that the charges were illegally collected, being a transportation charge not included in the railroad's published tariff, in violation of section 6 of the Interstate Commerce Act. The court held that shippers were *not* entitled to recover the amount of

the charge but only what was in excess of a reasonable charge for the service performed, and as there was no determination of the reasonableness of the charge there could be no recovery.

Upon the principle of the *Aron case* there could be no recovery here, since on this record the charges collected are admitted to have been reasonable.

Further support for this view is found in *Great Northern Ry.* v. *Sullivan*, 294 U. S. 458, wherein this Court set aside an order of the Interstate Commerce Commission awarding reparation in connection with shipments from points in Canada to destinations in the United States. There was no contention that the through rates were unreasonable and the Court observed that such rates "must be deemed to have been just and reasonable." The Commission had found unreasonable the rates applying to transportation within the United States and awarded reparation. The Court held that the shipper's only interest is that the charge should be reasonable as a whole.

Under this doctrine it is apparent, therefore, that respondents were not and could not have been damaged by collection of rates in harmony with the order of the Interstate Commerce Commission, since, as stated by the Supreme Court on this record, the rates charged "must be deemed to have been just and reasonable." And, indeed, as already made clear, the local rate of the railroads, viz., 65 cents, which also was the base rate to deliveries involving more than one line of railroad, was found to be reasonable and nondiscriminatory by the Illinois Commission.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the manifold errors of the Supreme

Court of Illinois in its decision herein, which is in conflict with the law as construed in applicable decisions of this Court and which, if it is permitted to stand as a precedent, will tend directly to obstruct and defeat the legislative policy of the Congress in exercising its constitutional powers, may be corrected and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of Illinois and finally reverse it.

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